

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

NORTH PARK NEIGHBORS, an
unincorporated association,

Petitioner,

v.

CITY OF LONG BEACH, ATLAS
CONSTRUCTION, LLC and BENJAMIN
TEHRANI and DIANA TEHRANI,

Respondents.

SHB NO. 05-030

ORDER DENYING SUMMARY
JUDGMENT

This matter comes before the Shorelines Hearings Board (Board) on a Motion for Summary Judgment filed by the Petitioner North Park Neighbors (North Park). The Petitioner is asking the Board to reverse the Shoreline Substantial Development Permit (SDP) issued by the City of Long Beach for the construction of a private road and improvements to a public roadway to serve a proposed four lot short plat.

The Board was comprised of Chair William H. Lynch, Kathleen D. Mix, Mary Alyce Burleigh, Peter Philley, and Judy Wilson. Administrative Appeals Judge Kay M. Brown presided for the Board. Attorney Jeffrey M. Eustis represented the Petitioner. Attorney Reed L. Sherar represented Respondent Atlas Construction LLC, Benjamin Tehrani and Diana Tehrani (Atlas). Attorney Jeffrey S. Myers represented the Respondent City of Long Beach (City).

ORDER DENYING SUMMARY
JUDGMENT
SHB NO. 05-030

1 In rendering its decision, the Board considered the following submittals:

- 2 1. Petition for Review with Appendices 1 and 2;
- 3 2. Motion by North Park for Summary Disposition, Attached Exhibits 1-9, 13, 14, 20, 7,
4 19 and 20, Declaration of Jeffrey M. Eustis and Attachments 1 through 5, and
5 Declaration of John Paul Graff with attached Exhibit A;
- 6 3. City's Response to Motion for Summary Judgment; Declaration of Jeffrey S. Myers,
7 and attached Exhibits A and B;
- 8 4. Response to Petitioner's Motion for Summary Disposition by Atlas, Declaration of
9 Diana Tehrani with Attachment 1, and Exhibits 1 through 10, 13 and 14; and,
- 10 5. Reply by North Park in Support of Summary Disposition, and Attachment 1.

11 Having fully considered the record in this case and being fully advised, the Board enters
12 the following ruling.

13 FACTUAL BACKGROUND

14 Atlas is the owner of a 1.76-acre parcel located along 7th Street North and Ocean Beach
15 Boulevard in the City of Long Beach. The parcel is bordered on the west by interdunal areas and
16 the Pacific Ocean. Atlas submitted an application for a shoreline substantial development permit
17 (SDP) to the City. The application sought approval to fill .3 acres of wetlands to construct roads
18 to service a new four lot single-family development. At the same time Atlas submitted the
19 application for the SDP, it submitted a short plat application to the City of Long Beach Council,
20 which was approved. *Petition for Review with Appendices 1 and 2 and Petitioner's Exs. 6 and 7.*

21 The lots lie east of the 1980 Seashore Conservation Line and carry a shoreline use
designation of S-1, Shoreline Single Family. To the west of the 1980 Seashore Conservation

ORDER DENYING SUMMARY

JUDGMENT

SHB NO. 05-030

Line lies the conservancy district. To mitigate for the proposed filling of the wetlands, Atlas has proposed a mitigation plan that preserves a large area to the west of the 1980 Seashore Conservation Line, as well as a smaller area between the 1980 and 1968 Seashore Conservation Lines. *Petition for Review with Appendices 1 and 2, Petitioner's Ex. 7, and Atlas's Exhibit 1.*

The number of acres of wetland to be filled, and the adequacy of the mitigation are at issue in this appeal, but are not challenged for purposes of this summary judgment motion.

Instead, North Park focuses on two of the six issues identified for hearing. These issues are:

1. Was the shoreline permit application unlawfully issued where the application failed to set forth all of the information required by WAC 173-27-180?
2. Was the shoreline permit issued in violation of the City of Long Beach's Shoreline Master Program where the mitigation of wetlands relied in part upon the preservation of lands, namely the Pacific Ocean beach, which are not eligible for wetland mitigation?

ANALYSIS

A. Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment

proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P. 2d 1207, 1210 (1992).

The trier of fact must construe the evidence and consider the material facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If the moving party is a respondent and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

Here the Board concludes there are contested issues of material fact related to both issues, and therefore denies summary judgment to North Park.

B. Compliance with WAC 173-27-180

WAC 173-27-180 lists the requirements for a complete shoreline substantial permit. North Park contends Atlas's application fails to comply with section eight and nine of this rule. In particular, North Park contends the application lacks:

An identification of the adjacent uses, structures and improvements, and intensity of development (WAC 173-27-180(8));

A site development plan consisting of elevation drawings to scale (WAC 173-27-180(9));

The ordinary high water mark designation for the Pacific Ocean (WAC 173-27-180(9)(b));

1 The dimensions and locations of all existing and proposed structures (WAC 173-27-
2 180(9)(f));

3 A landscaping plan for the project (WAC 173-27-180(9)(g));

4 Quantity, source and composition of any fill material that is placed on the site (WAC
5 173-27-180(9)(i));

6 Quantity, composition and destination of any excavated material (WAC 173-27-
7 180(9)(j));

8 A vicinity map showing the relationship of the property and proposed development or use
9 to roads, utilities, existing developments and uses on adjacent properties (WAC 173-27-
10 180(9)(k));

11 A depiction of the impacts to views (WAC 173-27-180(9)(l));

12 The standard for determining whether a shoreline substantial development is complete
13 was set out by the Supreme Court in *Hayes v. Yount*, 87 Wn. 2d 280, 295-296, 544 P.2d 1038
14 (1976). In that case, the court stated the shoreline application must “contain sufficient detail to
15 enable the local government and the Board to determine consistency” with the policies of the
16 Shoreline Management Act and its implementing regulations.

17 In its opening brief, Petitioner sets out alleged deficiencies in the application related to
18 each section identified above. *Petitioner’s memorandum in support of motion at p. 10*. In their
19 responses, both Atlas and the City identify documents, parts of documents, and testimony from
20 the open record hearing before the hearing examiner that they claim satisfy the alleged
21 deficiencies. *See Atlas’s memorandum in response at pp. 7 – 16, City’s memorandum in
response at pp 7-8*. The information relied upon by respondents includes maps and diagrams
that are difficult to interpret without the testimony of a witness to explain them.

1 In light of the evidence submitted by all parties, and the arguments made by the parties in
2 their briefs, the Board concludes that resolution of whether this application was adequate to
3 satisfy WAC 173-27-180 and the Court's standard in *Hayes v. Yount* raises disputed issues of
4 material fact that should be resolved only after a full evidentiary hearing.¹ Petitioner has not
5 made such a compelling argument regarding the deficiencies in the application that the Board
6 can hold as a matter of law that the City could not have meaningfully reviewed the application,
7 nor that this Board cannot meaningfully review it at hearing. Likewise, Respondents have not
8 made such a strong factual showing that all questions regarding the application's adequacy are
9 put to rest. Therefore, summary judgment is denied to the petitioner in this matter, and this issue
10 remains in the appeal to be decided after a full evidentiary hearing.

11 C. Land eligible for wetland mitigation

12 The second issue upon which the Petitioner moves for summary judgment is whether the
13 City erred in giving mitigation credit for the part of the lands west of the 1980 seashore
14 conservancy which are ocean beaches. Petitioner contends the shoreline master program (SMP)
15

17 ¹ The Board notes that most of the prior Shoreline Hearings Board's cases involving a decision by the Board on the
18 completeness of an application occurred after a full hearing. See *i.e. Luce v. City of Snoqualmie*, SHB No. 00-034
19 (2004); *Seaview Coast Conservation Coalition v. Pacific County*, SHB No. 99-020 (2000); *Larson Beach Neighbors*
20 *v. Stevens County*, SHB No. 94-18 (1995); *Department of Ecology v. City of Bellingham*, SHB No. 89-2 (1990);
21 *Whittle v. City of Westport*, SHB No. 82-2 (1982); *Whittle v. Westport*, SHB No. 81-10(1981). This is consistent
with the Board's de novo review authority that allows all parties to submit new evidence on the contested issues to
determine compliance with the law. *San Juan County v. Department of Natural Resources*, 28 Wn. App. 796, 799,
626 P. 2d. 995 (1981); *Groeneveld v. Snohomish County*, SHB No. 86-17 (1986). If after consideration of all the
evidence presented at the hearing, the Board concludes the application was so incomplete that the local government
and the Board could not review the application for compliance with the SMA, the Board can remand the matter to
the local government.

ORDER DENYING SUMMARY

JUDGMENT

SHB NO. 05-030

1 allows mitigation through protection of coastal dune habitat, and that, as a matter of law, ocean
2 beaches cannot be considered part of coastal dune habitat.

3 The City's shoreline master program provision at issue is §10.21B. SMP §10.21B allows
4 wetland mitigation through the preservation of coastal dune habitat. It states:

5 Single, Multi-Family and Commercial Development – Coastal dune habitat will be
6 preserved at a minimum of 3:1 (3 acres preserved for every 1 acre of wetland filling
7 and/or disturbance), west of the 1968 Seashore Conservation Line. The mitigation area
8 may include either upland or wetlands. Preservation means recording of a perpetual
9 conservation easement or transfer of ownership to the City or State of Washington;

10 It is undisputed that under this provision, Atlas and the City are counting areas that are in fact
11 ocean beaches in their calculation of the areas to be preserved.

12 "Coastal dune habitat" is not defined in the shoreline master program or the shoreline
13 management act. Petitioner argues, however, through a series of interpretations of various
14 related definitions, that the exclusion of "beach" from "coastal dune habitat" flows from the
15 concept that beach is not "wetland" or "upland." Atlas and the City respond, in a somewhat
16 similar manner, that beach can be included in the term "coastal dune habitat" because it is
17 included in the area west of the 1968 shoreline conservancy line, and is encompassed in the use
18 of the word "dune" in "coastal dune habitat."

19 The Board is not convinced by the parties' arguments that this is purely a question of law.
20 Instead, the Board believes the inclusion or exclusion of beach areas for wetland mitigation is
21 primarily a factual question which turns on many factual considerations including the exact
location of the included beach areas vis a vis the ordinary high water mark, and the current

1 preservation status of the included areas.² The record reflects factual disputes around these
2 issues. Given the importance of wetland mitigation, the Board believes a full factual record is
3 necessary to determine whether areas of beach were appropriately included in the wetland
4 mitigation calculation. Therefore, the Board denies summary judgment to Petitioner on this
5 issue, and concludes the issue should proceed to trial.

6 **ORDER**

7 The Petitioner's motion for summary judgment is denied. The two issues that are the
8 subject of this motion, along with the other issues identified in the pre-hearing order, will
9 proceed to hearing on March 27, 2006.

10
11
12
13
14
15
16
17
18
19

² The Petitioner raises for the first time in its reply brief that some of the areas identified for wetland mitigation are
20 already preserved for the public. The Board declines to rule on this issue on summary judgment because it was
21 raised for the first time in a reply brief, thus precluding an opportunity for the other parties to respond. *See, e.g.,*
Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549(1992)(an issue raised and argued for
the first time in a reply brief is too late to warrant consideration).

ORDER DENYING SUMMARY

JUDGMENT

SHB NO. 05-030

1 SO ORDERED this 21st day of February 2006.

2
3 **SHORELINES HEARINGS BOARD**

4 William H. Lynch, Chair

5 Kathleen D. Mix, Member

6 Judy Wilson, Member

7 Mary Alyce Burleigh, Member

8 Peter Philley, Member

9 Kay M. Brown, Presiding
10 Administrative Appeals Judge

11
12
13
14
15
16
17
18
19
20
21
ORDER DENYING SUMMARY
JUDGMENT
SHB NO. 05-030